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ADMINISTRATIVE REVIEW

In the matter of the Department of Corrections
Ruling Number 2024-5672
March 15, 2024

The grievant has requested that the Office of Employment Dispute Resolution (EDR) at the Department of Human Resource Management (DHRM) administratively review the hearing officer's decision in Case Number 12040. For the reasons set forth below, EDR will not disturb the hearing officer's decision.

FACTS

The relevant facts in Case Number 12040, as found by the hearing officer, are as follows:[1]

> The Agency employed the Grievant as lieutenant, a supervisory role that often puts the Grievant as the highest-ranking staff on site, without other active disciplinary actions.
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> The assistant warden testified that he instituted the disciplinary due process with the Grievant, and he first learned from the Grievant during this process that he was diabetic. The assistant warden testified that the Grievant is often the highest-ranking staff member during the night shift. The assistant warden testified consistently with the Written Notice, and he has input on the level of discipline but the decision is left to the warden.
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> Captain L. testified consistently with his written statement:
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> > On June 13, 2023, at approximately 0330 hours I [] was entering the shift commander's office. I observed [the Grievant] with his head down with his chin on his chest. He was not making any movements, nor did he acknowledge that I was standing in the doorway. I stepped away from the office door towards the shredder in the hallway. I put some papers on top of the shredder and went back to check on him. Before I could say something to him, someone said something on the radio and [the Grievant] announced count time.

[1] Decision of Hearing Officer, Case No. 12040 ("Hearing Decision"), Feb. 1, 2024, at 4-5 (internal citations omitted).

Captain L. testified that the Grievant's desk was facing the doorway, so the Grievant's view was in the direction of the doorway. He testified that while he could not see the Grievant's eyes, he observed the Grievant motionless as described for 15-20 seconds. An officer reported to Captain L. later in the shift that he observed the Grievant asleep. While Captain L. was the watch commander, the Grievant was the shift commander on duty. Captain L. learned for the first time during this disciplinary process that the Grievant is diabetic.

The warden issued the Group III Written Notice, and he testified consistently with the Written Notice. He recognized that the Grievant is often the highest-ranking officer on duty, and that the Grievant was a valued employee with a good work record. He testified that the Group III discipline was appropriate, but it was mitigated down to include no other adverse employment action such as job termination, demotion, or suspension. On cross-examination, the warden stated that he was aware of no other observation of the Grievant sleeping on duty. The other report of the Grievant sleeping had no bearing on the warden's disciplinary decision. The warden also confirmed that he elected to issue a warning to a non-supervisory corrections officer for sleeping on duty a month or so before the Grievant's offense.

The Agency called the Grievant to testify, and the Grievant testified that he was not sleeping on duty; that it was normal for Captain L. to walk by his office; and that he did not acknowledge Captain L.'s presence in the doorway because he was busy with something else. The Grievant testified that his diabetic condition was not relevant because he was not asleep as charged. The Grievant believed his superiors knew he was diabetic, so the captain's witnessing a moment of unconsciousness as described should have triggered an emergency response. At the conclusion of his testimony, the Agency rested. The Grievant elected not to testify further for his case and called no other witnesses.

> Through his grievance filings, the Grievant mentioned his diabetic condition:
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> Under the ADA (Americans with Disabilities Act), Diabetes is a disability. A disability is defined as a physical or mental impairment that substantially limits one or more major life activities. Major life activities include but are not limited to actions like eating, SLEEPING, speaking, and breathing. When someone has a diabetic "low", they can lose consciousness, become disoriented, etc.

The Grievant, however, insists that being diabetic or any disability therefrom is not applicable to the grievance because he was not asleep as charged.

On July 5, 2023, the agency issued to the grievant a Group III Written Notice, citing the offense of being asleep while on duty.[2] The grievant timely grieved this disciplinary action, and a hearing was held on January 30, 2024.[3] In a decision dated February 1, the hearing officer upheld the discipline on grounds that the agency had "proved the conduct described in the Written Notice and that it was misconduct" and that no mitigating circumstances existed to reduce the action.[4] The grievant now appeals the hearing decision to EDR.

DISCUSSION

By statute, EDR has been given the power to establish the grievance procedure, promulgate rules for conducting grievance hearings, and "[r]ender final decisions . . . on all matters related to . . . procedural compliance with the grievance procedure."[5] If the hearing officer's exercise of authority is not in compliance with the grievance procedure, EDR does not award a decision in favor of a party; the sole remedy is that the hearing officer correct the noncompliance.[6] The Director of DHRM also has the sole authority to make a final determination on whether the hearing decision comports with policy.[7] The DHRM Director has directed that EDR conduct this administrative review for appropriate application of policy.

Hearing officers are authorized to make "findings of fact as to the material issues in the case"[8] and to determine the grievance based "on the material issues and the grounds in the record for those findings."[9] Further, in cases involving discipline, the hearing officer reviews the facts *de novo* to determine whether the cited actions constituted misconduct and whether there were mitigating circumstances to justify a reduction or removal of the disciplinary action, or aggravating circumstances to justify the disciplinary action.[10] Thus, in disciplinary actions, the hearing officer has the authority to determine whether the agency has established by a preponderance of the evidence that the action taken was both warranted and appropriate under all the facts and circumstances.[11] As long as the hearing officer's findings are based on evidence in the record and the material issues of the case, EDR cannot substitute its judgment for that of the hearing officer with respect to those findings.

In his request for administrative review, the grievant denies he was asleep on duty, arguing that the witness who testified to finding the grievant asleep on duty was not credible. The grievant further maintains that he was disciplined more harshly than another employee who had been sleeping on the job, and also that the formal discipline the grievant received was motivated by retaliation because he was the one who had reported this other employee.

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[2] Agency Ex. 1; *see* Hearing Decision at 1.
[3] *See* Hearing Decision at 1.
[4] *Id.* at 6-7.
[5] Va. Code §§ 2.2-1202.1(2), (3), (5).
[6] *See Grievance Procedure Manual* § 6.4(3).
[7] Va. Code § 2.2-3006(A); Murray v. Stokes, 237 Va. 653, 378 S.E.2d 834 (1989).
[8] Va. Code § 2.2-3005.1(C).
[9] *Grievance Procedure Manual* § 5.9.
[10] *Rules for Conducting Grievance Hearings* § VI(B).
[11] *Grievance Procedure Manual* § 5.8.

Agency's Burden of Proof

The hearing officer found that the agency proved its allegation that the grievant was asleep on duty on June 13, 2023.[12] The hearing officer cited testimony from the Captain that, on that day, he observed the grievant appearing to be asleep, and that another officer reported to him later in the shift that he had also observed the grievant asleep.[13] Evidence in the record supports this conclusion. The Captain testified that when he walked into an office where the grievant was sitting, he saw that the grievant's head was down and the grievant did not acknowledge him.[14] He stated that he was certain the grievant was asleep because the grievant "did not recognize [the Captain] was in [the room] and [the Captain] was in there" for "15 or 20 seconds."[15] He also testified that another officer had subsequently reported to him that the grievant was sleeping.[16]

Although the grievant disputes the Captain's testimony and offered his own contrary testimony at the hearing, EDR has no basis to disturb the hearing officer's assessment of this conflicting evidence. Conclusions as to the credibility of witnesses and the weight of their respective testimony on issues of disputed facts are precisely the kinds of determinations reserved solely to the hearing officer, who may observe the demeanor of the witnesses, take into account motive and potential bias, and consider potentially corroborating or contradictory evidence. Weighing such evidence and rendering factual findings is squarely within the hearing officer's authority, and EDR has repeatedly held that it will not substitute its judgment for that of the hearing officer where the facts are in dispute and the record contains evidence that supports the version of facts adopted by the hearing officer, as is the case here.[17] Accordingly, EDR declines to disturb the hearing decision on these grounds.

Because there is no basis to disturb the hearing officer's findings that the agency met its burden of proof, we assess the grievant's remaining assignments of error as mitigation claims.

Mitigation

By statute, hearing officers have the power and duty to "[r]eceive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with rules established by [EDR]."[18] The *Rules for Conducting Grievance Hearings* ("*Rules*") provide that "a hearing officer is not a 'super-personnel officer'"; therefore, "in providing any remedy, the hearing officer should give the appropriate level of deference to actions by agency management that are found to be consistent with law and policy."[19] More specifically, in disciplinary grievances, if the hearing officer finds that (1) the employee engaged in the behavior described in the Written Notice, (2) the behavior constituted misconduct, and (3) the agency's discipline was consistent with law and

[12] Hearing Decision at 6.
[13] *Id.* at 4.
[14] *Id.*; *see also* Hearing Recording at 45:35-46:10; Agency Ex. 8.
[15] Hearing Recording at 52:00-52:20, 53:20-54:00.
[16] *Id.* at 50:30-51:30.
[17] *See*, *e.g.*, EDR Ruling No. 2020-4976.
[18] Va. Code § 2.2-3005(C)(6).
[19] *Rules for Conducting Grievance Hearings* § VI(A).

policy, then the agency's discipline must be upheld and may not be mitigated, unless, under the record evidence, the discipline exceeds the limits of reasonableness.[20]

Because reasonable persons may disagree over whether and to what extent discipline should be mitigated, a hearing officer may not simply substitute his or her judgment on that issue for that of agency management. Indeed, the "exceeds the limits of reasonableness" standard is high.[21] Where the hearing officer does not sustain all of the agency's charges and finds that mitigation is warranted, they "may reduce the penalty to the maximum reasonable level sustainable under law and policy so long as the agency head or designee has not indicated at any time during the grievance process . . . that it desires a lesser penalty [to] be imposed on fewer charges."[22] EDR, in turn, will review a hearing officer's mitigation determination for abuse of discretion[23] and will reverse the determination only for clear error.

Inconsistent Discipline

The grievant argues that "there is such a disparity of disciplinary action taken against two different people for the same offense simply based on rank" that the Group III Written Notice he received was unreasonable. Section VI(B)(2) of the *Rules* provides that mitigating circumstances may include "whether the discipline is consistent with the agency's treatment of other similarly situated employees."[24] As with all affirmative defenses, the grievant has the burden to raise and establish any mitigating factors.[25] Analogous precedent from the Merit Systems Protection Board ("MSPB") on this issue provides that a grievant must show that the agency improperly considered the "consistency of the penalty with those imposed upon other employees for the same or similar

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[20] *Id.* at § VI(B)(1).

[21] The federal Merit Systems Protection Board's approach to mitigation, while not binding on EDR, can serve as a useful model for EDR hearing officers. *E.g.*, EDR Ruling No. 2012-3102; EDR Ruling No. 2012-3040; EDR Ruling No. 2011-2992 (and authorities cited therein). The Board's similar standard prohibits interference with management's judgment unless, under the particular facts, the discipline imposed is "so harsh and unconscionably disproportionate to the offense that it amounts to an abuse of discretion." Parker v. U.S. Postal Serv., 819 F.2d 1113, 1116 (Fed. Cir. 1987) (citations and internal quotation marks omitted). On the other hand, the Board may mitigate discipline where "the agency failed to weigh the relevant factors, or the agency's judgment clearly exceeded the limits of reasonableness." Batten v. U.S. Postal Serv., 101 M.S.P.R. 222, 227 (M.S.P.B. 2006), *aff'd*, 208 Fed. App'x 868 (Fed. Cir. 2006).

[22] *Rules for Conducting Grievance Hearings* § VI(B)(1).

[23] "An abuse of discretion can occur in three principal ways: 'when a relevant factor that should have been given significant weight is not considered; when an irrelevant or improper factor is considered and given significant weight; and when all proper factors, and no improper ones, are considered, but the court, in weighing those factors, commits a clear error of judgment.'" Graves v. Shoemaker, 299 Va. 357, 361, 851 S.E.2d 65, 66-67 (2020) (quoting Landrum v. Chippenham & Johnston-Willis Hosps., Inc., 282 Va. 346, 352, 717 S.E.2d 134, 137 (2011). The "abuse-of-discretion standard includes review to determine that the [exercise of] discretion was not guided by erroneous legal conclusions, because a court also abuses its discretion if it inaccurately ascertains [the] outermost limits of the range of choice available to it." Lambert v. Sea Oats Condo. Ass'n, 293 Va. 245, 253, 798 S.E.2d 177, 182 (2017) (internal quotation omitted) (alterations in original); *see also* United States v. Jenkins, 22 F.4th 162, 167 (4th Cir. 2021) (A tribunal abuses its discretion "when it acts arbitrarily or irrationally, fails to consider . . . recognized factors constraining its exercise of discretion, relies on erroneous factual or legal premises, or commits an error of law.").

[24] *Rules for Conducting Grievance Hearings* § VI(B)(2).

[25] *Grievance Procedure Manual* § 5.8; *Rules for Conducting Grievance Hearings* § VI(B)(1).

offenses."[26] Once such an inference is presented, the MSPB precedent holds that the burden shifts to the agency to prove a legitimate explanation for the disparate treatment.[27] Similarly, the *Rules* provide that while it is the burden of the grievant to "raise and establish mitigating circumstances," the agency bears the burden of demonstrating "aggravating circumstances that might negate any mitigating circumstances."[28] Therefore, in making a determination whether inconsistent treatment supports mitigation, a hearing officer must assess, for example, the nature of the charges, the comparability of the employees' positions (including their positions within the organization and whether they have the same supervisor(s) or work in the same unit), and, crucially, the stated explanation for why the employees are allegedly treated disparately.[29]

In his decision, the hearing officer noted testimony by the facility warden that he had "elected to issue a warning to a non-supervisory corrections officer for sleeping on duty a month or so before the Grievant's offense."[30] However, the hearing officer concluded that this non-supervisory employee was "not a similarly situated employee" for purposes of evaluating inconsistent discipline, as the grievant "is in a position of authority who should be modeling conduct . . . ."[31] The grievant challenges this assessment, arguing that "rank plays a part in the disciplinary action taken against someone," such that a "supervisor must face the consequences of allegedly being asleep the first time . . . when they do not have constant direct contact with the inmate population" as non-supervisory officers do. While the grievant clearly disagrees with the standard the agency applied to him as a supervisory employee, neither he, the hearing officer, nor EDR is empowered to overrule the agency's judgment in this regard, provided it is within the bounds of reasonableness. Here, the hearing officer accepted as reasonable the agency's position that supervisors are held to a higher standard for the example they must set in the workplace, which was supported by testimony in the record.[32] Accordingly, the hearing officer concluded that the grievant had not met his burden to prove that similarly-situated employees were disciplined more leniently for a comparable offense. EDR finds no basis to disturb the hearing decision on these grounds.

Retaliation

Finally, the grievant maintains that the allegation against him "was retaliation for [the grievant] observing [another officer] asleep earlier in the year." A claim of retaliation may qualify for a hearing if the grievant presents evidence raising a sufficient question whether (1) he engaged in a protected activity; (2) he suffered an adverse employment action; and (3) a causal link exists between the protected activity and the adverse action.[33] Ultimately, a successful retaliation claim

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[26] *E.g.*, Singh v. U.S. Postal Serv., 2022 M.S.P.B. 15, at 6, 13-15 (2022) (overruling the "more flexible approach" EDR has cited in the past from *Lewis v. Dep't of Veterans Affairs*, 113 M.S.P.R. 657 (2010), and instead going back to a more rigid analysis that requires the relevant offenses to be of the same or similar kind).
[27] *E.g.*, *Singh*, 2022 M.S.P.B. at 7; *Lewis*, 113 M.S.P.R. at 665.
[28] *Rules for Conducting Grievance Hearings* § VI(B)(2); *see also Grievance Procedure Manual* § 5.8.
[29] *See, e.g.*, EDR Ruling No. 2024-5636.
[30] Hearing Decision at 4.
[31] *Id.* at 6.
[32] Hearing Recording at 1:04:50-1:07:30 (Warden's testimony).
[33] *See* Netter v. Barnes, 908 F.3d 932, 938 (4th Cir. 2018) (citing Univ. of Tex. S.W. Med. Ctr. v. Nassar, 570 U.S. 338, 360 (2013)); Villa v. CavaMezze Grill, LLC, 858 F.3d 896, 900-901 (4th Cir. 2017).

must demonstrate that, but for the protected activity, the adverse action would not have occurred.[34] Here, the hearing officer found that there was "no evidence of any improper motive by the Agency, such as retaliation."[35] Given the hearing officer's finding that the agency proved misconduct by a preponderance of the evidence and that such misconduct "is squarely within the Group III level" of discipline,[36] EDR finds no error in his conclusion that the evidence did not suggest a pretext for retaliation.

CONCLUSION AND APPEAL RIGHTS

For the reasons set forth above, EDR declines to disturb the hearing officer's decision in this matter. Pursuant to Section 7.2(d) of the *Grievance Procedure Manual*, a hearing decision becomes a final hearing decision once all timely requests for administrative review have been decided.[37] Within 30 calendar days of a final hearing decision, either party may appeal the final decision to the circuit court in the jurisdiction in which the grievance arose.[38] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[39]

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[34] *Id.*
[35] Hearing Decision at 7.
[36] *Id*. at 6.
[37] *Grievance Procedure Manual* § 7.2(d).
[38] Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).
[39] *Id.*; *see also* Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).